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No. 93-2024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FREEDOM REPUBLICANS, INC. and
LUGENIA GORDON, PRESIDENT,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE MASSACHUSETTS BLACK REPUBLICAN COUNCIL AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 2024

Freedom Republicans, Inc. and
Lugenia Gordon, President, Petitioners

v.

Federal Election Commission, Respondent

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF THE MASSACHUSETTS CHAPTER OF THE NATIONAL BLACK REPUBLICAN COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The Massachusetts Chapter of the National Black Republican Council (Mass-BRC) is a predominantly African-American political membership organization which is an official chapter of an official arm of the Republican National Committee.

Amicus is deeply concerned about the impact of racial discrimination on the process for nominating and selecting the presidential and vice-presidential candidates of this nation's major political parties. Amicus is also concerned about the impact of racial discrimination on participation in the political processes generally and the Respondent's apparent belief that they are exempt from the Civil Rights Act of 1964. It is the belief of the amicus that for individuals who are members of minority groups to be accorded equal opportunity for participation in the American political process and to achieve their full potential therein, that political process must be subject to all the civil rights protection found in the federal constitution and legislation.

Petitioner and amicus are both multi-racial, predominantly African-American, avowedly Republican, political membership organizations. In addition, amicus is an official chapter of the

Republican Party, a member of the groups targeted by the Rules of the Republican Party for "special treatment and benefits" by having their own separate hyphenated name, separate organization and structure, and even having their own separate national convention to be held concurrent with the Republican National Convention. Presumably the Republican National Committee intends this life of separation to be equal as well. Furthermore, amicus is from a state that is disadvantaged by the Republican rules in participation at the national level. If these two groups, and amicus in particular, have no standing to challenge the respondent's funding of discriminatory activities, it is difficult to imagine that such a plaintiff would ever exist.

ARGUMENT

Background of the Civil Rights Act of 1964

In order to understand how the Court of Appeals' narrow technical application of the well established three prong test for standing was erroneous, it is important to take the broader view incorporating the background and purposes of the Civil Rights Act of 1964 and Title VI in particular.

In response to this nation's most evil progeny (racial discrimination) of its most evil social institution (slavery), Congress, among other things, passed the Civil Rights Act of 1965 (CRA). The ubiquitous nature of this discrimination was well known and understood. Title VI recognizes two fundamental principles of modern American society. First, federal funding is pervasive and a powerful force in shaping societal attitudes. Second, it was recognized that regardless of public policy, purely private racial discrimination such as

membership in a private organization or an individual's political speech, is a constitutionally protected first amendment activity and beyond the ability of government to force to conform to any public policy standard.

Accordingly, the policy behind Title VI has two purposes. First, granting and denying federal funding is to be used variously in a carrot and stick approach to bring an end to discrimination. Second, Title VI recognized that discrimination was deeply embedded in personal traits and institutional operations, and that there would be great resistance to the end of racial discrimination. Therefore, Title VI also effects a policy of denying funding to those who will not be dissuaded from their morally repugnant, bigoted activities. In other words, if we cannot stop the discrimination, we will at least disassociate ourselves from it and its taint.

The purpose of the Civil Rights Act is to end racial discrimination, not grandfather it and subsidize it.

The Court of Appeals and the Respondent's application of causation and redressability violate these policies and run counter to simple common sense. The purpose of the Civil Rights Act is to end racial discrimination, not grandfather it and subsidize it. Respondent argues that because the Republican Rules existed prior to the inception of federal funding - which in important respects is erroneous -, that federal funding could not have caused the discrimination and, therefore, the federal government should continue to provide the funding and subsidize the discriminatory practice.

Because the FEC considers itself exempt from Title VI of the Civil Rights Act - and has formally requested Congress to so exempt it - and, therefore, has no implementing regulations, it is difficult to ascertain what test the FEC deems

appropriate for the denial of funds. But the logical extension of their standing position concludes that no one would ever be denied funding by any federal agency. Causation and redressability as argued and applied below would deny funding only if the funding directly caused the discrimination and denying subsequent funding would cease the discrimination. Under a literal interpretation, an organization could apply for federal funding to perpetuate discrimination and state that discrimination will exist with or without federal funding, and therefore, be eligible for continued funds.

Such an absurd result is highly unlikely, but possible under the ruling of the Court of Appeals. It is possible because that Court misconstrues the causal nexus as discussed in the Petitioner's brief, and fails to understand and analyze the two distinct injuries for which redress is sought. With respect to the first injury, the Court itself

speculates on the causation/redressability issue rather than remanding to a fact-finding tribunal.

Injury # 1: Discrimination of the Republican Party Rules

The Court of Appeals discusses this injury and appropriately characterizes it as indirect. It then misapplies the Article III standing test from a focus on the relation between a complainant and the challenged "program or activity," to the relation between the "program or activity" and the federal funding assisting it. Then, in this misdirected analysis the Court below stated "nor can we confidently predict any causal connection between a possible judicial response and the redress of the appellee's injury." The Court then shortly concludes that "we cannot begin to predict on this record what impact withdrawal [of federal funding] might have on Party decisionmaking... Freedom Republicans has not borne its burden of

adducing evidence to demonstrate that it is "'likely' as opposed to merely 'speculative,' that [its] injury will be 'redressed by a favorable decision.'"

This conclusion is plausible, though disingenuous (see next paragraph) given that standing was raised at the first instance at the Court of Appeals. There was no factual basis established at the trial level for or against standing and rather than remanding to a fact finding tribunal, the Court of Appeals foreclosed the appropriate factual hearing on the standing issue.

This result is outrageous and unjustified given the practical political considerations of the issue. If the Republican Party is denied federal funds because they are found to be racially discriminatory, the party would have the option of not accepting federal funds, or to redress the discriminatory rules. It is simply beyond the pale

to believe that in contemporary American society that a major political party would publicly declare that they wish to remain bigoted in their practices and opt out of the federal funding of their national convention.

Such an action would be a double blow. First, the party would be admitting to being racially discriminatory which would be a severe political blow. Second, the party would then have to fundraise to replace the lost federal funds and it would have to find donors willing to fund an admitted bigoted organization.

Given these considerations, it does seem likely that petitioners could marshall necessary evidence to establish causation/redressability when that issue is properly raised at the fact finding level.

Injury #2: Funding of the Discrimination by the FEC

The act of funding the discrimination as opposed to the discrimination itself is not recognized for what it is - a distinct injury establishing its own cause of action. When discrimination is going to exist with or without federal funding, it is not the purpose of Title VI to throw our hands up and surrender access to the federal treasury, but to declare the moral repugnancy of the discrimination and to disassociate the federal government from that action and its actors.

Title VI seeks to protect targets of racial discrimination from having that discrimination subsidized by the federal government. Petitioners and amicus are predominantly of that class of people which Title VI seeks to protect. In this instance, federal funding is not only the cause of the injury, but the injury itself and, therefore,

there is no doubt that denial of the funding would redress the injury.

Inadequate History and Analysis of the Party Rules

The Court of Appeals accepts without comment or analysis the history of the rules as presented by the Republican National Committee in their amicus brief. That presentation is mistaken.

First, it is accepted that the rules date from 1916, well before the inception of federal funding. But one of the objectionable rules was written after federal funding. The first hyphenated ethnic or racial auxiliary was created in 1976 with more added in 1980 and 1984. These auxiliaries were created partially in response to federal funding. The Department of Justice model Title VI regulations state that any racial classification, no matter how benignly intended, is prima facia discriminatory. A second objectionable

rule, the grandfather clause benefitting only the smallest states, was only adopted in 1972.

Second, the bonus system was characterized as one which rewarded party strength and success. But the reward is done in a discriminatory manner. The base apportionment for the national convention is that each state gets three delegates for each of its electoral college votes. Thus Wyoming has three electoral votes and nine convention delegates. Florida has 25 electoral votes and 75 base convention delegates. If each state receives the maximum possible uniform bonus delegates (nine per state), Wyoming will receive a 100 percent bonus while Florida receives a 15 percent bonus. The mathematics of the Republican rules and the geography of the American population is such that regardless of electoral success, smaller more homogenous states will always receive a proportionately larger bonus than the larger states which hold a preponderance of America's minority

populations. The documented history of the formation of the rules that both pre-date and post-date federal funding show a discriminatory intent, and their application shows a discriminatory effect.

CONCLUSION

For the foregoing reasons, the petition for a writ of certioari should be granted.

Respectfully submitted,

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